

the FS stock held by FP immediately after the triangular reorganization is determined pursuant to paragraph (c) of this section.

(B) Pursuant to paragraph (c) of this section, each share of FS stock is divided into portions attributable to the basis and holding period of the FS stock held by FP immediately before the exchange (the FS portion) and the FT stock held by F1 immediately before the exchange (the FT portion). The basis and holding period of the FS portion is the basis and holding period of the FS stock held by FP immediately before the exchange. Thus, each share of FS stock has a portion with a basis of \$5x and a value of \$10x. Because the exchanging shareholder of FT stock (F1) has a section 1248 shareholder of both F1 and FT, the basis and holding period of the FT portion is the proportionate amount of the basis and the holding period of the FT stock immediately before the exchange to which such portion relates. Thus, each share of FS stock will have a second portion with a basis of \$17x (\$170x basis/10 shares), a value of \$20x (\$200x value/10 shares), a holding period of 5 years, and \$1x of earnings and profits (\$10x earnings and profits/10 shares) attributable to such portion for purposes of section 1248.

(iii) *Subsequent disposition.* (A) Several years after the merger, FP disposes of all of its FS stock in a transaction governed by section 964(e). At the time of the disposition, FS stock has decreased in value to \$210x (a post-merger reduction in value of \$90x), and FS has incurred a post-merger deficit in earnings and profits of \$30x.

(B) Pursuant to paragraph (d)(1)(ii) of this section, for purposes of determining the amount of gain realized on the sale or exchange of stock that has a divided portion, any amount realized on such sale or exchange is allocated to each divided portion of the stock based on the relative fair market value of the stock to which the portion is attributable at the time the portions were created. Immediately before the merger, the value of the FS stock in relation to the value of both the FS stock and the FT stock was one-third (\$100x/(\$100x plus \$200x)). Likewise, immediately before the merger, the value of the FT stock in relation to the value of both the FT stock and the FS stock was two-thirds (\$200x/\$100x plus \$200x). Accordingly, one-third of the \$210x amount realized is allocated to the FS portion of each share and two-thirds to the FT portion of each share. Thus, the amount realized allocated to the FS portion of each share is \$7x (one-third of \$210x divided by 10 shares). The amount realized allocated to the FT portion of each share is \$14x (two-thirds of \$210x divided by 10 shares).

(C) Pursuant to paragraph (d)(3) of this section, any earnings and profits (or deficits) accumulated by the surviving corporation subsequent to the reorganization are attrib-

uted to the divided portions of shares of stock based on the relative fair market value of each divided portion of stock. Accordingly, one-third of the post-merger earnings and profits deficit of \$30x is allocated to the FS portion of each share and two-thirds to the FT portion of each share. Thus, the deficit in earnings and profits allocated to the FS portion of each share is \$1x (one-third of \$30x divided by 10 shares). The deficit in earnings and profits allocated to the FT portion of each share is \$2x (two-thirds of \$30x divided by 10 shares).

(D) When FP disposes of its FS stock, FP is treated as disposing of each divided portion of a share of stock. With respect to the FS portion of each share of stock, FP recognizes a gain of \$2x (\$7x value - \$5x basis), which is not recharacterized as a dividend because a deficit in earnings and profits of \$1x is attributable to such portion for purposes of section 1248. With respect to the FT portion of each share of stock, FP recognizes a loss of \$3x (\$14x value - \$17x basis).

(f) *Effective date.* This section applies to exchanges occurring on or after January 23, 2006.

[T.D. 9243, 71 FR 4289, Jan. 26, 2006, as amended by T.D. 9400, 73 FR 30303, May 27, 2008; T.D. 9446, 74 FR 6958, Feb. 11, 2009]

§ 1.367(b)-14T Acquisition of parent stock for property in triangular reorganizations (temporary).

(a) *In general*—(1) *Scope and purpose.* This section applies to triangular reorganizations where P or S (or both) is foreign and, in connection with the reorganization, S acquires, in exchange for property (as defined in this section), all or a portion of the P stock that is used to acquire the stock or assets of T. This section may apply to a reorganization regardless of whether P controls S (within the meaning of section 368(c)) at the time S acquires the P stock that is used to acquire the stock or assets of T. The purpose of this section is to prevent what is in effect a distribution of property to P without the application of provisions otherwise applicable to property distributions, when in connection with a triangular reorganization S acquires, in exchange for property, all or a portion of the P stock used in the reorganization.

(2) *Definitions.* For purposes of this section, the following definitions apply:

(i) The terms *P*, *S*, and *T* have the meanings set forth in § 1.358-6(b)(1)(i), (ii), and (iii), respectively.

(ii) In general, the term *property* has the meaning set forth in section 317(a). Notwithstanding section 357(a), such term includes any liability assumed by *S* in exchange for the *P* stock used to acquire the stock or assets of *T*. Such term also includes any *S* stock used by *S* to acquire *P* stock from a person other than *P*.

(iii) The term *triangular reorganization* means a reorganization described in § 1.358-6(b)(2) or in section 368(a)(1)(G) and (a)(2)(D).

(b) *General rules*—(1) *Deemed distribution*. If this section applies, adjustments shall be made that have the effect of a distribution of property from *S* to *P* under section 301 (deemed distribution). The amount of the deemed distribution shall equal the amount of money plus the fair market value of other property transferred, in connection with the reorganization, by *S* in exchange for the *P* stock used to acquire the stock or assets of *T* in the triangular reorganization. Additional adjustments shall be made under paragraph (b)(3) of this section to the extent *S* acquires, in exchange for property, *P* stock from a person other than *P*.

(2) *Timing in the case of acquisitions from P*. To the extent *S* acquires *P* stock from *P* in exchange for property, the deemed distribution described in paragraph (b)(1) of this section shall be treated as a transaction separate from, and occurring immediately before, the triangular reorganization. Therefore, *P* shall not be treated as receiving the property from *S* in exchange for *P* stock. The transfers of *P* stock in the triangular reorganization shall be subject to generally applicable provisions. See, for example, § 1.1032-2.

(3) *Timing and deemed contribution in the case of acquisitions from persons other than P*. To the extent *S* acquires *P* stock from a person other than *P* in exchange for property (the purchase), then immediately following the deemed distribution described in paragraph (b)(1) of this section, adjustments shall be made that have the effect of a contribution by *P* to *S* (deemed contribution) of the property

deemed distributed by *S* to *P* under paragraph (b)(1) of this section. If *P* controls *S* (within the meaning of section 368(c)) at the time of the purchase, the deemed distribution and deemed contribution shall be treated as separate transactions occurring immediately before the purchase. If *P* does not control *S* (within the meaning of section 368(c)) at the time of the purchase, the deemed distribution and deemed contribution shall be treated as separate transactions occurring immediately after *P* acquires control of *S*. Other provisions, such as sections 304, 354, 358 and 368, shall apply after the adjustments made pursuant to paragraph (b)(1) of this section and this paragraph.

(4) *Example*. The rules of this paragraph (b) are illustrated by the following example:

(i) *Facts*. *P*, a publicly traded domestic corporation, owns all of the outstanding stock of *FS*, a foreign corporation, and all of the outstanding stock of *US1*, a domestic corporation that is a member of the *P* consolidated group. *US1* owns all of the outstanding stock of *FT*, a foreign corporation, the fair market value of which is \$100x. *FS* purchases \$100x of *P* stock on the open market for cash. Pursuant to foreign law, *FT* merges with and into *FS* in a triangular reorganization described in section 368(a)(1)(A) by reason of section 368(a)(2)(D). *US1* exchanges all the outstanding stock of *FT* for the stock of *P* purchased by *FS* on the open market for \$100x cash.

(ii) *Analysis*. The triangular reorganization is described in paragraph (a)(1) of this section. Therefore, pursuant to paragraphs (b)(1) and (b)(3) of this section, *FS* is treated as distributing \$100x to *P* under section 301. Immediately after such deemed distribution, *P* is deemed to contribute to *FS* the \$100x that was deemed distributed to *P*. The deemed distribution and deemed contribution are treated as separate transactions occurring immediately before *FS*'s purchase of the *P* stock used in the triangular reorganization.

(c) *Collateral adjustments*. This paragraph (c) provides rules for the treatment of a deemed distribution or deemed contribution resulting under paragraph (b)(1) or (b)(3) of this section.

(1) *Deemed distribution*. A deemed distribution of property described in paragraph (b)(1) of this section shall be treated as a distribution of property

for all purposes of the Internal Revenue Code. For example, under section 301(c) the distribution may constitute a dividend to the extent of the earnings and profits of S, a return of basis, or gain from the sale or exchange of property, as appropriate. In addition, sections 902 and 959 may apply when S is foreign, and sections 897, 1442, and 1445 may apply when S is domestic.

(2) *Deemed contribution.* A deemed contribution of property described in paragraph (b)(3) of this section shall be treated as a contribution of property for all purposes of the Internal Revenue Code. For example, appropriate adjustments to P's basis in the S stock and other affected items shall be made according to applicable provisions.

(d) *Special rule.* Appropriate adjustments shall be made pursuant to this section if, in connection with a triangular reorganization, a transaction is engaged in with a view to avoid the purpose of this section as described in paragraph (a)(1) of this section. For example, if S is formed or availed of with a view to avoid the purpose of this section, the earnings and profits of S may be deemed to include the earnings and profits of a corporation related to S (within the meaning of section 267(b)).

(e) *Effective/applicability date.*—(1) *Acquisitions of P stock from P or related persons.* Except as otherwise provided in this paragraph (e), this section applies to triangular reorganizations described in paragraph (a)(1) of this section, to the extent S acquires the P stock from P or from a person related to P or S within the meaning of section 267(b) or 707(b), occurring on or after September 22, 2006. This section, however, shall not apply to triangular reorganizations described in paragraph (a)(1) of this section, to the extent S acquires the P stock from P or from a person related to P or S within the meaning of section 267(b) or 707(b), completed on or after September 22, 2006, pursuant to a written agreement that was (subject to customary conditions) binding before September 22, 2006, and all times afterward.

(2) *Acquisitions of P stock from persons other than P.*—(i) *General rule.* Except as otherwise provided in this paragraph (e), this section applies to triangular reorganizations described in paragraph

(a)(1) of this section, to the extent S acquires the P stock from a person other than P that is not related to P or S within the meaning of section 267(b) or 707(b) (unrelated person), occurring on or after May 31, 2007.

(ii) *Binding commitment exception.* This section shall not apply to triangular reorganizations described in paragraph (a)(1) of this section, to the extent S acquires the P stock from an unrelated person, pursuant to a written agreement that was (subject to customary conditions) binding before May 31, 2007, and all times afterward, but only to the extent that—

(A) S acquired the P stock from an unrelated person before May 31, 2007; or

(B) S had a commitment to acquire the P stock from an unrelated person pursuant to a written agreement that was (subject to customary conditions) binding before May 31, 2007, and all times afterward, or pursuant to a tender offer announced before May 31, 2007, that is subject to section 14(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 78n(d)(1)) and Regulation 14(D) (17 CFR 240.14d–1 through 240.14d–101) or that is subject to comparable foreign laws.

(3) *Application of special rule.*—(i) *General rule.* Except as provided in paragraph (e)(3)(ii) of this section, paragraph (d) of this section applies to triangular reorganizations described in paragraph (a)(1) of this section occurring on or after May 31, 2007.

(ii) *Binding commitment exception.* Paragraph (d) of this section shall not apply to triangular reorganizations described in paragraph (a)(1) of this section entered into pursuant to a written agreement that was (subject to customary conditions) binding before May 31, 2007, and all times afterward, but only to the extent that—

(A) S acquired the P stock before May 31, 2007; or

(B) S had a commitment to acquire the P stock from an unrelated person pursuant to a written agreement that was (subject to customary conditions) binding before May 31, 2007, and all times afterward, or pursuant to a tender offer announced before May 31, 2007, that is subject to section 14(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 78n(d)(1)) and Regulation 14(D)

(17 CFR 240.14d-1 through 240.14d-101) or that is subject to comparable foreign laws.

(4) *Treatment of S stock as property*—(i) *General rule.* Except as provided in paragraph (e)(4)(ii) of this section, the treatment of S stock as property under paragraph (a)(2)(ii) of this section applies to triangular reorganizations described in paragraph (a)(1) of this section occurring on or after May 23, 2008.

(ii) *Binding commitment exception.* The treatment of S stock as property under paragraph (a)(2)(ii) of this section shall not apply to triangular reorganizations described in paragraph (a)(1) of this section occurring on or after May 23, 2008 entered into pursuant to a written agreement that was (subject to customary conditions) binding before May 23, 2008 and all times afterward, but only to the extent that—

(A) S acquired the P stock before May 23, 2008; or

(B) S had a commitment to acquire the P stock from an unrelated person pursuant to a written agreement that was (subject to customary conditions) binding before May 23, 2008 and all times afterward, or pursuant to a tender offer announced before May 23, 2008, that is subject to section 14(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 78n(d)(1)) and Regulation 14(D) (17 CFR 240.14d-1 through 240.14d-101) or that is subject to comparable foreign laws.

(5) *Expiration.* The applicability of this section expires May 23, 2011.

[T.D. 9400, 73 FR 30303, May 27, 2008]

§ 1.367(d)-1T Transfers of intangible property to foreign corporations (temporary).

(a) *Purpose and scope.* This section provides rules under section 367(d) concerning transfers of intangible property by U.S. persons to foreign corporations pursuant to section 351 or 361. Paragraph (b) of this section specifies the transfers that are subject to section 367(d) and the rules of this section, while paragraph (c) provides rules concerning the consequences of such a transfer. In general, the U.S. transferor will be treated as receiving annual payments contingent on productivity or use of the transferred property, over the useful life of the property (regard-

less of whether such payments are in fact made by the transferee). Paragraphs (d), (e), and (f) of this section provide rules for cases in which there is a later direct or indirect disposition of the intangible property transferred. In general, deemed annual license payments will continue if a transfer is made to a related person, while gain must be recognized immediately if the transfer is to an unrelated person. Paragraph (g) of this section provides several special rules, including a rule allowing appropriate adjustments where deemed payments under section 367(d) are not in fact received by the U.S. transferor of the intangible property, and a rule providing for a limited election to treat certain transfers of intangible property as sales at fair market value (in lieu of applying the general useful life-contingent payment rule). In addition, paragraph (g) of this section provides rules coordinating the application of section 367(d) with other relevant Code sections. Paragraph (h) of this section defines the term *related person* for purposes of this section. Finally, paragraph (i) of this section provides the effective date of this section. For rules concerning transfers of intangible property pursuant to section 332, see § 1.367(a)-5T(e). For purposes of determining whether a U.S. person has made a transfer of intangible property that is subject to the rules of section 367(d), the rules of § 1.367(a)-1T(c) shall apply.

(b) *Intangible property subject to section 367(d).* Section 367(d) and the rules of this section shall apply to the transfer of any intangible property, as defined in § 1.367(a)-1T(d)(5)(i). However, section 367(d) and the rules of this section shall not apply to the transfer of foreign goodwill or going concern value, as defined in § 1.367(a)-1T(d)(5)(iii), or to the transfer of intangible property described in § 1.367(a)-5T(b)(2). However, the transfer of those items to a foreign corporation is subject to the rules set forth in § 1.367(a)-6T, and the transfer of intangible property described in § 1.367(a)-5T(b)(2) is subject to the rules set forth in § 1.367(a)-5T. For a special rule relating to the transfer of operating intangibles, as defined in § 1.367(a)-1T(d)(5)(ii), see paragraph (g)(3) of this section.